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HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 7192 OF 2007.

Rajendra Dhanji Sakhala.
Age: 46 years,
G/1, Jai Santoshi Apartments,
Rajendra Nagar,
Dattapada Road,
Borivali (East),
Mumbai - 400 066. ..Petitioner.

V E R S U S

1. State Election Commission,
having its Office at New
Administrative Bldg,
Mantralaya, Mumbai - 32.

2. State of Maharashtra,
Through: Secretary,
Social Welfare Deptt.,
Mantralaya, Mumbai - 32.

3. Municipal Corporation for
Brihanmumbai, having its Office
at Mahapalika Marg, Fort,
Mumbai - 400 001.

4. Simintini Sitaram Koregaonkar
@ Samintini Sandesh Narkar,
Adult, Indian inhabitant,
Corporator from Ward No.13,
Borivali, R/o: 40, Parishram,
Rajendra Nagar, Borivali (E),
Mumbai - 400 066. ..Respondents.

Ms. Gouri Godse for the petitioner.
Mr. S. B. Shetye for respondent no.1.
Mr. R. D. Rane, G.P. for respondent no.2 - State.
Mr. A. J. Bhor for respondent no.3.
Mr. L. M. Acharya for respondent no.4.

ALONG WITH
CIVIL APPLICATION NO. 2552 OF 2007.

Smt. Aparna Anant Narvekar. ..Applicant.
Versus.
Rajendra Dhanji Sankhala & others. ..Respondents.

Mr. R. K. Mendadkar for the applicant.

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CORAM: S.B.MHASE & D.G.KARNIK,JJ.

DATE : OCTOBER 22, 2007.

ORAL JUDGMENT (Per D. G. Karnik,J)

1. Rule. By consent rule is made returnable forthwith. Heard counsel for the parties.

2. By this petition the petitioner seeks a writ of certiorari or any other appropriate writ for setting aside the notification dated 12th September 2007 issued by the respondent no.1 - State Election Commission for holding of the by-election to Ward Nod. 13 of the Mumbai Municipal Corporation (for short, "the Corporation").

3. The general election to the respondent no.2 Mumbai Municipal Corporation were held on 1st February 2007 and the respondent no.4 was declared elected to a seat reserved for the "Other Backward Classes" (for short, "OBC"). The elections results were declared on 2nd February 2007. The caste certificate produced by the respondent no.4 declaring her caste to be Vaishyvani, on enquiry was invalidated by the Caste Scrutiny Committee by its order dated 2nd June 2007. Consequently, the election of the respondent no.4 to the post of Councillor was deemed to be invalidated under second proviso to section 5(b) of the Mumbai Municipal

Corporation Act, 1888 (for short, "the Act".) . Though the respondent no.4 has challenged the order of the Caste Scrutiny Committee invalidating her caste certificate by filing a writ petition no stay either to the order of the Caste Scrutiny Committee or to the termination of her election has been granted.

4. Relying upon the provisions of Section 33 of the Act, the present petitioner, who is not a candidate at the election but merely a voter residing in Ward No.13, has filed an election petition, bearing No. Election Petition (stamp) No. 1107 of 2007 in the Small Causes Court, Mumbai for declaring election of the respondent no.4 as null and void and declaring the candidate who has secured the second highest number of votes from Ward No. 13 in the elections held on 2nd February 2007 is deemed to have been elected. That election petition has been filed on 21st September 2007 along with an application for condonation of delay in filing the election petition.

5. Even before the election petition along with the delay condonation application was filed by the petitioner, the State Election Commission has declared that the election of the respondent no.4 is terminated on her caste certificate being invalidated and has further issued a notification on 22nd August 2007 for by-elections to the Ward No. 13. This

notification is impugned by the present petition.

6. Sub-section (2) of section 33 of the Act provides that if a person whose election is objected to (by filing an election petition) is disqualified for being a councillor then the Judge (Election Court) declare the such person's election to be null and void, and shall direct that the candidate, if any, in whose favour the next highest number of valid votes is recorded shall be deemed to have been elected. Relying upon this provisions Counsel for the petitioner submitted that as the respondent no.4 was disqualified on account of his not belonging to the OBC, the Election Court would not only be required to formally set aside his election but also be required to declare that the candidate who secured the next highest number of votes is elected from the Ward No.13. Counsel further submitted that as the election Court would, on conclusion of the election petition declare that the candidate securing next highest number of votes is elected it is inappropriate for the Election Commission to issue a notification for holding of by-elections to the Ward No.13.

7. At the outset it may be noted that the caste claim of the respondent no.4 was invalidated on 2nd June 2007. Therefore, on account of the second proviso to section 5B of the Act, the election of the

respondent no.4 stood terminated retrospectively by the operation of law. The seat became vacant with retrospective effect. On seat of the Ward no.13 becoming vacant, under section 9 of the Act the respondent no.1 is bound to hold the fresh election as expeditiously as possible, and has accordingly issued a notification dated 12th September 2007 for holding elections. It may be noted that on the date of notification dated 12th September 2007 no election petition was pending challenging the election of the respondent no.4. The election petition has been filed by the petitioner only on 22nd September 2007 along with the application for condonation of delay. Since no election petition was pending there was no occasion for the State Election Commission to await decision of the election petition. On the date of the impugned notification there was no question of declaring the candidate who had secured the second highest number of valid votes to be elected. We therefore cannot find any fault in the notification dated 12th September 2007 issued by the respondent no.1.

8. Learned counsel for the petitioner however submitted that in any event further continuation of the election process after the election petition was filed by the petitioner on 22nd September 2007, should have been halted by the State Election Commission. Because the candidate securing the second highest

number of valid votes is likely to be declared elected in the election petition. We are unable to agree for the reasons indicated below.

9. Section 33(1) of the Act says that if the qualification of any person declared to be elected as councillor is disputed then any voter may within 10 days (ten days) from the date on which the list of the elected candidates is published under clause (k) of section 28 of the Act may apply to the Chief Judge of the Small Causes Court. In the present case the list of elected candidates was published on 7th February 2007. Therefore, the application for challenging the election (election petition) ought to have been filed within 10 days from 7th February 2007, i.e., on or before 17th February 2007. The election petition in question is filed on 21st September 2007 and is hopelessly barred by limitation. As such no valid election petition was pending on the date of impugned notification nor can it be said to be pending even on the date of filing of the present writ petition.

10. Learned counsel for the petitioner however submitted that the petitioner has filed an application for condonation of delay. She invited our attention to the averments made in paragraph 11 of the election petition which are also repeated in application for condonation of delay. Therein it is

stated that the election was held on 1st February 2007 and the results were announced on 2nd February 2007, and although the period of limitation for filing an election petition had expired long time back, the petitioner had recently come to know about the disqualification of the respondent no.4 because of invalidation of her caste certificate. Therefore, the delay in filing the election petition needs to be condoned. In our view, the averments for condonation of delay, to say the least are extremely vague. The petitioner has nowhere stated the exact date when he came to know about the disqualification of the respondent no.4 on account of invalidation of her caste certificate. On the basis of which such vague averments it is not possible to entertain the election petition condoning the delay.

11. In our view the provisions of Section 5 of the Limitation Act do not apply to the election petition filed under section 33 of the Act. Counsel for the petitioner, however, strongly relied upon the decision of the Supreme Court in **Shaikh Saidulu @ Saida v/s. Chukka Yesu Ratnam & Others reported in (2002) 3 SCC 130** and submitted that Section 5 of the Limitation Act applies even for the election petition. Therein the Supreme Court held that Section 5 of the Limitation Act was applicable to the election petitions filed under the Hyderabad Municipal Corporations Act, 1955 (for short, "the

Hyderabad Act."). Section 671 of the Hyderabad Act specifically provides that in computing the period of limitation, fixed for an application or appeal, referred to in the Hydrabad Act, the provisions of Sections 5, 12 and 13 of the Limitation Act would apply. There is no section similar to section 671 of the Hyderabad Act in the Mumbai Municipal Corporation Act, 1888. Therefore, the aforesaid decision is not applicable to the facts of the present case.

12. Learned counsel however submitted that in **Shaikh Saidulu @ Saida v/s. Chukka Yesu Ratnam & Others reported in (2002) 3 SCC 130** the Supreme Court held that section 5 of the Limitation Act applied not only on the basis of section 671 of the Hyderabad Act but also by following its earlier decision in Hukumdev Narain Yadav v/s. Lalit Narain Mishra [(1974) 3 SCR 31]. However, in a later decision rendered in Mangu Ram v/s. Municipal Corporation of Delhi [(1976) 1 SCC 392] the Supreme Court has held that the provisions of section 5 of the Limitation Act are not applicable to the election petition. We may also refer to the provisions of sub-section (5) of Section 33 of the Act which specifies that every election not called in question (by filing an election petition) shall be deemed to have been to all intents a good and valid election. The election of a councillor, which is not challenged by filing an election petition within the prescribed time is

regarded as valid. Thus by necessary implication the applicability of section 5 of the Limitation Act has been excluded qua the election petitions under the Act. The election is a sacred act wherein the voters elect a person of their choice. If such an act is to be challenged it must be done strictly in accordance with the law which permits the challenge and also within the time permitted by law. The election cannot be set aside lightly nor can any challenge be entertained after the period of limitation.

13. Smt. Aparna A. Narvekar who has secured the next highest number of valid votes in the election held on 1st February 2007 and who has sought permission to intervene has not filed any election petition challenging the election of the respondent no.4 on any ground.

14. It may be noted that on 2nd June 2007, on the caste certificate of the respondent no.4 being declared invalid by the Caste Scrutiny Committee the election of the respondent no.4 stood terminated by retrospective effect by reason of second proviso to Section 5B of the Act, Section 5B of the Act reads thus:

"5B. Person contesting election for reserved

seat to submit Caste Certificate and Validity Certificate-

Every person desirous of contesting election to a seat reserved for the Scheduled Casts, Scheduled Tribes or, as the case may be, Backward Class of Citizens, shall be required to submit, alongwith the nomination paper, Caste Certificate issued by the Competent Authority and the Validity Certificte issued by the Scrutiny Committee in accordance with the provisions of the Maharashtra Scheduled Castes, Scheduled Tribes, De-notified Tribes (Vimukta Jatis), Namadic Tribes, Other Backward Classes and Special Backward Category (Regulation of Issuance and Verification of) Caste Certificate Act, 2000.

Provided that, a person who applied to the Scrutiny Committee for the verification of his Caste Certificte before the dte of filing of the nominationpaper but who has not received the validity certificate on the date of fioing of the nomination paper shall submit, along with the nomination paper,-

(i) a true copy of the application preferred by him to the Scrutiny Committee for issuance of the validity certificate or any other proof for having made such application to the Scrutiny Committee; and

(ii) an undertaking that he shall submit, within a period of four months from the date of his election, the validity certificate issued by the Scrutiny Committee:

Provided further that, if the person failed to produce the validity certificate within a period of four months from the date of his election, **his election shall be deemed to have been terminated retrospectively** and he shall be disqualified for being a Councillor."

. The termination of election to the post of a Councillor reserved for a backward class candidate takes place retrospectively on the caste certificate being invalidated by the Scrutiny Committee. As such on 22nd September 2007 there would be no occasion for the petitioner to file an election petition for a

declaration that the election of the respondent no.4 stood terminated as the termination had already taken place retrospectively on the caste certificate of the respondent being invalidated. The respondent no.4, of course, has challenged the decision of the Caste Scrutiny Committee by a writ petition in which initially interim protection was granted. However, that interim order was vacated by this Court on 31st July 2007. Special Leave Petition filed against the said decision was dismissed by the Supreme Court on 28th August 2007. Thus the retrospective termination of the election of the respondent no.4 has been upheld upto the highest Court. As the election of the respondent no.4 has already stood terminated there was no occasion for the petitioner to file an election petition on 22nd September 2007.

15. At this stage reference may be made to a decision of a Division Bench of this Court in **Geeta Kisan Gote v/s. State of Maharashtra and others reported in 2003 (4) Mh.L.J. 287.** The Court held that where the returned candidate has been declared disqualified and no election petition is pending in which an order can be passed under sub-section (2) of section 33 of the Act, the procedure laid down under section 9 of the Act, (i.e., for holding fresh elections) has to be followed. But where the returned candidate is declared disqualified and an election petition is pending the Judge is enjoined to

declare the candidate obtaining next highest number of valid votes as elected under sub-section (2) of section 33. Thus the occasion for declaring the candidate who has secured the next highest number of valid votes as elected would arise only if an election petition challenging the election of the elected candidate is pending on the date of declaration or termination. In the present case at the relevant time when the election of the respondent no.4 stood terminated no election petition was pending and therefore there was no occasion for the Election Court to apply the provisions of sub-section (2) of Section 33 of the Act. In our opinion, therefore, the Election Commission rightly decided to proceed under section 9 of the Act. We therefore find no merit in the petition.

16. As regards the costs we note that the petitioner secured the order of stay of the election when the election process had already begun. The election process was halted midway after the nomination papers were received. The petitioner was aware that the election process had commenced and had gone upto the stage of the filing of the nomination papers. The petitioner was also aware that there was no valid election petition pending when the process of election had commenced. It was only two days before filing of the present writ petition, i.e., on 22nd September 2007 that the petitioner filed the

election petition along with an application for condonation of delay. Immediately thereafter the petitioner rushed to this Court on 24th September 2007. He represented to this Court that a valid election petition was pending without disclosing that it was filed only two days ago. The petitioner was very much aware that the election petition filed by him was hopelessly barred by the limitation. The petitioner secured interim order halting the election process by active concealment of the true facts. The petitioner thus misused the process of law for obtaining the stay to the election process. We therefore dismiss the writ petition by imposing exemplary costs of Rs.50,000/- (Rs. Fifty thousand only). The Collector is directed to recover the amount of costs from the petitioner as arrears of land revenue, if the same is not paid within one month.

17. At the request of petitioner operation of the order for recovery of costs is stayed for four weeks.

18. For these reasons the petition is dismissed with costs as quantified above. Rule discharged.

19. The State Election Commission is directed to proceed with the Election in accordance with law.

(D.G.KARNIK, J.) (S.B.MHASE, J.)